Supreme Court, U.S.
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No. 93-1384

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

DOWNTOWN FRANKFORT, INC. and JOHN GRAY, individually and as President of Downtown Frankfort, Inc.,
Cross-Petitioners,

v.

CAPITAL AREA RIGHT TO LIFE, INC.,
Cross-Respondent.

On Cross-Petition for Writ of Certiorari to the Supreme Court of Kentucky

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BRIEF IN OPPOSITION TO CROSS-PETITION

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INTRODUCTION

Capital Area Right to Life, Inc. (CARTL),[1] petitioner in No. 93-1201 [2] and cross-respondent in No. 93-1384, hereby opposes the cross-petition of Downtown Frank-

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[1] CARTL is a nonprofit corporation. It has no parent company or subsidiaries. *See* Rule 29.1.

[2] The petition in No. 93-1201 is captioned *Capital Area Right to Life, Inc. v. Downtown Frankfort, Inc.*

fort, Inc. (DFI), respondent in No. 93-1201 and cross-petitioner in No. 93-1384.

The basic scenario of this litigation is straightforward. DFI sponsors and promotes festivals on public forum property in the City of Frankfort, Kentucky. These festivals feature booths in which vendors, civic groups, and others promote themselves and their activities. In 1989, DFI permitted CARTL to operate a booth in the "Great Pumpkin Festival." In 1990, DFI denied permission for abortion advocacy groups (pro and con), including CARTL, the Kentucky National Organization for Women, and the Kentucky Religious Coalition for Abortion Rights, to have booths at the festival.

CARTL sued in state court for declaratory and injunctive relief, charging unconstitutional content-based discrimination against CARTL's speech. DFI responded by arguing that DFI was free to discriminate because DFI was not a state actor subject to the Fourteenth Amendment.

The state trial court and appeals court sustained DFI's defense that there was no state action. The Supreme Court of Kentucky disagreed and held DFI to be a state actor; nevertheless, the state supreme court affirmed the judgment in DFI's favor, holding that DFI's discriminatory policy was not an unconstitutional restriction on free speech.

CARTL petitioned this Court for review on the free speech question, No. 93-1201, and DFI has cross-petitioned on the state action question, No. 93-1384.

REASONS FOR DENYING THE WRIT

Both CARTL and DFI agree that the decision of the Supreme Court of Kentucky was incorrect as a matter of federal constitutional law. CARTL takes issue with the state supreme court's ruling on the merits of CARTL's claim of free speech. DFI takes issue with the state supreme court's ruling on the merits of DFI's defense of no state action. Only CARTL, however, suffered an adverse *judgment* in the state supreme court. Therefore, only CARTL can petition this Court for review.

CARTL has sought review on the free speech issues. *See* Pet. for Cert., No. 93-1201. DFI has not questioned the "certworthiness" of this petition. Response to Pet., No. 93-1201. Instead, DFI seeks by its cross-petition to place before this Court the state action issue as well.

There are two basic reasons why this Court should not grant the cross-petition.

First, the cross-petitioners lack standing to seek review. The judgment of the Supreme Court of Kentucky—affirming summary judgment for DFI—was entirely *favorable* to DFI. "[A]s the successful party below[, DFI] has no standing to appeal from the decree . . . ," *Public Serv. Comm'n v. Brashear Freight Lines, Inc.*, 306 U.S. 204, 206 (1939) (per curiam) (dismissing appeal). *Accord New York Tel. Co. v. Maltbie*, 291 U.S. 645, 645 (1934) (per curiam) (dismissing appeal). While DFI may disagree with the state supreme court's *opinion*, "this Court reviews judgment, not opinions." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984) (footnote omitted). Thus, this Court should dismiss DFI's cross-petition.

Second, DFI's cross-petition is unnecessary. A respondent may defend the judgment below, without a cross-petition, on any ground which the law and record permits and which would not expand the relief it has been granted. *United States v. New York Tel. Co.*, 434 U.S.

159, 166 n.8 (1977). *See generally* R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 363-64 (7th ed. 1993) (collecting cases). Should this Court grant CARTL's petition in No. 93-1201, DFI is free to urge affirmance on the basis of its state action defense.[3] Therefore this Court should in any event deny DFI's cross-petition.

CONCLUSION

Accordingly, this Court should either dismiss the cross-petition for lack of jurisdiction or, in the alternative, deny the cross-petition as unnecessary.[4]

Respectfully submitted,

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[3] Of course, this Court retains the discretion to limit its review to the precise questions presented in the petition for certiorari. *E.g., National Organization for Women v. Scheidler,* 114 S. Ct. 798 (1994) (declining to address alternate grounds for affirmance urged by respondents).

[4] It bears mention as well that DFI's cross-petition regularly and improperly goes outside—or even contrary to—the record in this case. Perhaps most egregious is DFI's astonishing denial that government funds helped pay for the 1990 "Great Pumpkin Festival." Cross-Pet. at 7. This contradicts DFI's own acknowledgment that DFI was funded by government agencies. *See id.* at 3. DFI cannot simultaneously dispute the material facts while claiming entitlement to summary judgment in its favor.